ROBERT WEISBECKER and BARBARA MARINUCCI, his wife, Plaintiffs-Respondents,

v.

ZURICH AMERICAN INSURANCE COMPANY, a/k/a UNIVERSAL UNDERWRITERS INSURANCE COMPANY, Defendant, and

MERCURY INSURANCE GROUP, Defendant-Appellant.

No. A-1551-10T2.

Superior Court of New Jersey, Appellate Division.

Submitted June 8, 2011.
Decided October 17, 2011.

Methfessel & **Werbel**, attorneys for appellant (Gina M. Stanziale, on the brief).

Ronald DeSimone, attorney for respondents.

Before Judges Ashrafi and Kestin.

NOT FOR PUBLICATION

PER CURIAM.

Defendant Mercury Insurance Group (Mercury) appeals from an order entered on November 12, 2010, granting plaintiffs' motion for summary judgment on their complaint for declaratory relief seeking the benefit of underinsured motorist (UIM) coverage provided by Mercury. The amount determined to be due was "$100,000 less $15,000 which [plaintiffs] had received from the tortfeasor[.]" We affirm.

The order vacated an earlier order, entered on October 15, 2010, in favor of Mercury on its motion for summary judgment. The earlier order had recited specifically that the insurance policy issued by Mercury "provides no coverage for any and all claims arising out of [a particular auto accident] including, but not limited to, any and all claims for underinsured motorist benefits[.]" Also on October 15, 2010, the trial court had entered a second order granting summary judgment to "Universal Underwriters Insurance Company[,] improperly pled as Zurich American Insurance" (Universal), from which plaintiffs had also sought UIM coverage.

The initial cross-motions for summary judgment and the arguments on October 15, 2010, disclosed that the motor vehicle accident giving rise to the UIM claims occurred on August 1, 2006. Plaintiff Robert Weisbecker was employed as a driver by Earle's Tire Service and was operating his employer's vehicle at the time. Plaintiffs settled their personal injury claims with the tortfeasor for the $15,000 limit in that person's liability insurance policy.

Mercury had issued a policy to Weisbecker's wife, plaintiff Barbara Marinucci, insuring another vehicle. Weisbecker, covered as a spouse, was named in that policy as a driver of the insured vehicle. That policy's UIM coverage limit was $100,000/$300,000. Weisbecker was also insured under his employer's policy with Universal, which provided a $15,000 UIM coverage limit for him.

Plaintiffs sought UIM coverage under both policies. Universal disclaimed on the basis of plaintiffs' settlement with the tortfeasor in the light of a step-down provision in its policy. Mercury disclaimed on the basis of a provision in its policy barring UIM coverage when an insured was "occupying a vehicle insured under another policy on which you are an insured." Plaintiffs sued, and the trial court eventually entered the October 15, 2010 orders granting the summary judgment motions of both carriers.

Several days later, on October 21, 2010, the motion judge initiated an on-the-record telephone conference call with counsel for all parties. He focused on plaintiffs' claim against Mercury, reciting the carrier's three grounds for denying coverage, as expressed in its motion for summary judgment, all based on particular policy exclusions: one, regarding the commercial use of the vehicle operated by the insured; a second, "that the vehicle was . . . a non-owned car," and had been "provided for the

regular use under another policy[;]" and the third, pertaining to the other-vehicle/other-policy provision noted above as the basis for Mercury's initial disclaimer.

The judge then referred to another provision in the Mercury policy that he had discovered in preparing for the next motion day's matters, which included a primacy-of-coverage motion filed by Mercury that came to be withdrawn in consequence of the October 15 grants of summary judgment and the October 21 telephone conference. The judge stated that his reading of the newly-discovered clause had engendered another review of the summary judgment motion papers and supporting documents. That newly discovered clause provided: "any underinsured motorist coverage provided by this policy for an insured who sustains bodily injury while occupying a vehicle not owned by you, your spouse or any relative shall be excess over other collectible insurance." The judge said that, while nothing he had discovered would change his summary judgment ruling in favor of Universal, "with respect to Mercury, I believe . . . that there may well be coverage under the Mercury policy under this exclusion[,]" noting that ambiguities in an insurance policy are construed against the insurer. The judge scheduled further consideration of the issue at an oral argument on November 12, and afforded the parties further opportunity for briefing.

After considering the parties' additional written and oral arguments, the judge determined that the initial grant of summary judgment in favor of Mercury had been erroneous. He construed the lately discovered clause as establishing the UIM insurance provided by Mercury — in the circumstances, with Universal out of the case because of its $15,000 policy limit — as the only coverage available, precluding any argument regarding primacy. The judge allowed that the focal clause, with its reference to "other collectible insurance," while significant in Mercury's primacy-of-coverage motion, took on broader importance once Universal was out of the case. At the very least, it created an ambiguity when considered along with the clause excluding coverage when the insured was operating another vehicle in respect of which he was insured by another carrier. If there was no other collectible insurance (because of the limitation that resulted in the denial of plaintiffs' claim against Universal), Mercury, as the only extant insurer, could not invoke the clause excluding its coverage when the insured was operating a Universal-insured motor vehicle.

We reject the arguments advanced by Mercury challenging the validity of the November 12 order memorializing the motion judge's announced change of view. The arguments are premised on the notions that the judge erred in reaching the new result and had engaged in a mistaken exercise of discretion when he, sua sponte, changed the result in an earlier order; and the contention that plaintiffs failed to observe the requirements of Rule 4:49-2 in seeking the relief that was eventually granted.

The Supreme Court, in recently-decided Lombardi v. Masso, ___ N.J. ___ (2011), has laid to rest any doubts about the propriety or the breadth of a trial court's discretionary capacity, "at any time prior to the entry of final judgment," to re-analyze and modify its own interlocutory rulings and correct whatever error it recognizes in an earlier ruling. Id. at ___ (slip op. at 30) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257-264 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988). See also R. 4:42-2. The motion judge here was careful to "provide the parties a fair opportunity to be heard on the subject," and to apply all other fairness standards required in such an instance. Lombardi, supra, ___ N.J. at ___ (slip op. at 36-38).

We are in substantial agreement with the motion judge's view that the various clauses of Mercury's insurance contract created an ambiguity regarding the circumstances and extent of UIM coverage, calling for application of the principle that ambiguities in an insurance policy are to be resolved against the drafter, see Tomaiuoli v. United States Fid. & Guar. Co., 75 N.J. Super. 192, 207 (App. Div. 1962), in order to fulfill the "reasonable expectations of the assured in the purchase of" the policy, Allstate Ins. Co. v. Schmidt, 238 N.J. Super. 619, 627 (App. Div. 1990).

Affirmed.